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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 57

BOB FRED ASHE,

Petitioner,

—v.—

HAROLD R. SWENSON, Warden
Missouri State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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1. Contrary to the implications in Respondent's brief (R. Br. pp. 4-8), Petitioner's plea is not based upon an allegation that the State of Missouri cannot consistent with due process prosecute at separate trials separate criminal offenses arising out of a single criminal episode. As stated in Petitioner's main brief (pp. 19, 21), the Court, in order to provide Petitioner with the constitutional protections implicit in the Due Process Clause, need not determine that the robbery of multiple victims involves a single offense rather than multiple offenses. This case presents a more narrow question. The State violated Petitioner's rights

under the Due Process Clause of the Fourteenth Amendment by placing him a second time in jeopardy after he had been acquitted on the key issue of his participation in the robbery of Don Knight, Ray Roberts and the four other victims. Whatever may be the circumstances under which multiple prosecutions may be brought and multiple punishment imposed for the commission of a single criminal transaction, due process is clearly denied when a defendant is tried again after a jury has acquitted him on the one contested element common and cardinal to each of the multiple offenses with which he was charged. By doing so in this case, Missouri forced the Petitioner to run the gauntlet twice. This clearly infringes the principles inherent in the prohibition against double jeopardy and violates the Due Process Clause of the Fourteenth Amendment.

2. Respondent argues that the State was not estopped from subsequently trying Petitioner for the robbery of Roberts because issues other than Petitioner's identity may have been dispositive in the prior prosecution for robbing Knight (R. Br. pp. 9-10). This Court in *Hoag* v. *New Jersey*, 356 U.S. 464 (1958), declined to decide whether collateral estoppel applied to a subsequent prosecution for robbery after an acquittal in a prior trial for a separate offense on the ground that the state supreme court had ruled that "the trial of the first three indictments involved several questions, not just [petitioner's] identity, and there is no way of knowing upon which question the jury's verdict turned" (356 U.S. at 471). Here the Missouri Supreme Court similarly sought to find issues other than the Petitioner's identity that might have been controlling in the trial of Knight. The court stated, "In the trial where Knight was the person alleged to have been robbed, the jury may

not have believed beyond a reasonable doubt that any property was taken from Knight. In the case now before us, the jury found that property was taken from Roberts" (A. 225-226).

It is clear from the record, however, that the sole controverted issue in the first prosecution was not whether Knight had been robbed but by whom. It was directly established that Knight was robbed of his money, his watch and his billfold (A. 17). The fact of Knight's loss was not contested. Furthermore, three of the other victims each gave testimony sufficient to establish all of the basic elements of the crime.

Farfetched conjecture as to possible issues determinative of the jury's verdict in the first trial other than Petitioner's identity should not, through citation to *Hoag,* be allowed to cut off consideration of Petitioner's constitutional rights. The court of appeals also speculated that the jury may have based its verdict on various issues other than identity (A. 244-245). However, the realistic analysis of the facts by the federal district court showed that no speculation is justified as to the controlling issue involved in the jury's acquittal of Petitioner. The court said (A. 235):

> "An examination of the transcript of both trials shows that in both the single issue in real contest, as distinguished from the issues that may be said to have been in technical dispute, was the question of whether petitioner was or was not present at the time the money was taken from the poker table and the other property taken from persons of the respective poker players."

Further, Respondent's brief recognizes the State's awareness that Petitioner's acquittal in the trial for robbing

Knight resulted from lack of adequate identification. Respondent first observes that "The failure of the state to call McClendon at the second trial was a tactical decision and cannot be said so fundamentally unfair as to be a denial of due process" (R. Br. p. 11). McClendon, who had known Petitioner for twenty years and was his uncle by marriage, had positively stated at the first trial that the three actual participants in the holdup were Johnson, Larson, and Brown (A. 30-32). Respondent refers expressly to the attempt of the State in the second trial to improve the testimony and correct the deficiencies of proof on the issue of identification (R. Br. p. 11):

> "We do not deny that some of the witnesses at the second trial gave more favorable testimony from the state's point of view than they gave at the first trial. No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation *in light of the turn of events at the first trial.*" (Emphasis added.)

In our main brief (pp. 13-14) we have shown in detail the manner in which the state prosecutor refined the testimony of his witnesses to repair the only weak point in his case—placing Petitioner at the scene of the crime.

There is no merit to the argument of Respondent that a court cannot examine the trial record and determine the underlying findings implicit in a jury's verdict (R. Br. p. 10). As the Court stated in *Hoag,* "It is of course true that when necessary to a proper determination of a claimed denial of constitutional rights this Court will examine the record in a state criminal trial and is not foreclosed by the

conclusion of the state court." (*Hoag* v. *New Jersey, supra,* 356 U.S. at 471.) Furthermore, as in *Sealfon* v. *United States,* 332 U.S. 575 (1948) and the other cases cited in our main brief (pp. 25-27), it is not unusual for courts to evaluate the trial record to determine the particular issue involved in a jury verdict of acquittal in order to protect a defendant from successive litigation of an issue determined in his favor.

Petitioner contends that under the circumstances of this case the Missouri court was in error in not examining the record and determining that collateral estoppel must apply to protect Petitioner from multiple trials on the same issue.

3. Respondent argues that even if the doctrine of collateral estoppel applies in this case, its application by the State of Missouri is not constitutionally mandatory (R. Br. pp. 15-17). In our main brief (pp. 24-28) we have shown that, in cases where the Double Jeopardy Clause was technically inapplicable, collateral estoppel has been applied by both federal and state courts to preserve the fundamental principle of justice that a man should not be compelled to prove his innocence twice.

In the present case collateral estoppel becomes essential to provide the Petitioner with those fundamental rights which are inherent in the constitutional guarantee against double jeopardy. Under the theory of the State of Missouri the contemporaneous robbery of six victims constitutes six different offenses, and it could proceed to try Petitioner separately for each offense until it obtained a conviction. This view would permit a sixth trial notwithstanding the fact that Petitioner had been acquitted in five successive trials. A second trial after acquittal on the key issue of

identity is equally a transgression of the requirements of fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment.

As set forth in the preceding pages, in this case after the Petitioner was acquitted of robbing Knight on the ground of "insufficient evidence," he was then put to trial for the robbery of Roberts. This enabled the prosecutor "to refine his presentation in light of the turn of events at the first trial" and to see if he could not do better the second time in adducing testimony placing Petitioner on the scene. This offends the basic principle of the Fifth Amendment protection against double jeopardy.

It is deeply rooted in the philosophy underlying the Double Jeopardy Clause that a verdict of acquittal is final and ends a defendant's jeopardy. Furthermore, "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States,* 355 U.S. 184, 187-188 (1957).

There is no longer any doubt that the Double Jeopardy Clause of the Fifth Amendment is binding on the states in every respect by its incorporation into the Due Process Clause of the Fourteenth Amendment. Since the filing of Petitioner's main brief, the Court in *Benton* v. *Maryland,* 395 U.S. 784 (1969), moved far beyond the "selective incorporation" standard laid down in *Palko* v. *Connecticut,* 302 U.S. 319 (1937). Under *Palko* the states were required

to apply the Fifth Amendment protection against double jeopardy only when the kind of double jeopardy to which a defendant was subjected imposed a "hardship so acute and shocking that our polity will not endure it," and where such double jeopardy violated those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." 302 U.S. 319, 328. In *Benton* the Court, in overruling *Palko,* held that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment" (395 U.S. at 794), and "Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice'." (395 U.S. at 796.)

However, as pointed out in our brief on the merits (pp. 18-19), even under the standards of *Palko,* the action of the State in this case clearly subjected Petitioner to an unfair burden inconsistent with the constitutional due process guarantee and violated basic principles of liberty and justice.

The decision in *Benton* underscores the deprivation of the constitutional rights of Petitioner by the State of Missouri. Moreover, it emphasizes the necessity of applying the concept of collateral estoppel as a constitutional safeguard to prevent the states from circumventing the double jeopardy protection of the Fifth Amendment through distinctions in defining offenses or by other technicalities. This is abundantly illustrated by the present case where Missouri's practice provided the means by which the Petitioner's acquittal could be ignored and he could be brought to trial on successive charges arising from the same event until a conviction was obtained.

Petitioner believes it is clear that collateral estoppel becomes essential to the meaningful application of the protection against double jeopardy and must be accorded constitutional status in this case in order to preserve the fundamental principles of justice underlying the Fifth and Fourteenth Amendments.

Conclusion

For these reasons and those set out in Petitioner's main brief, it is respectfully submitted that the judgment of the court below should be reversed, and directions given to issue the Writ of Habeas Corpus.

Respectfully submitted,

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